Supreme Court, U.S.
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No. 02-1128

IN THE

Supreme Court of the United States

VINCENT GRASSO, ET AL.,

Petitioners,

v.

CITY OF NEW BEDFORD, ET AL.,

Respondents.

BRIEF OF RESPONDENTS CITY OF NEW BEDFORD AND COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether government actors can be held jointly liable for using and participating in diverse regulatory proceedings to keep the value of land down while the government considers whether to take the land for a secondary wastewater treatment plant.

II. Whether it was error under *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) on cross motions for summary judgment to fail to consider direct and substantial evidence of the intent of responsible City officials to deny an application to change zoning because it would increase the value of land and otherwise facilitate the owner's development and use of same when the City was considering whether to take the land for a secondary wastewater treatment plant.

III. Whether the state statute of limitations for the assertion of the Fifth Amendment right to compensation for a taking by regulatory action can be construed in a manner prohibited by *United States v. Dickinson*, 331 U.S. 745 (1947) to force landowners to engage in the piecemeal and premature litigation of potentially unripe claims and to otherwise unfairly put the burden on the landowner to determine the precise moment a taking has occurred during regulatory processes when the taking has been effected by a continuing series of decisions and actions taken by diverse government actors in different ongoing administrative and other proceedings.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Vincent Grasso, Robert P. Regan, Palmers Cover Limited Partnership, and Old New Bedford, Plaintiffs-Petitioners;

City of New Bedford, Massachusetts Executive Office of Environmental Affairs, Commonwealth of Massachusetts, Defendants-Respondents.

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STATEMENT OF THE CASE

The Respondents state the Petitioners Statement of the Case fails to accurately describe the facts jointly submitted by the parties to the State Court in an agreed statement of facts. A more complete statement of the facts is included in the decisions issued by the trial judge and the Justices for the Appeals Court. The Respondents rely on these findings and not the Statement of the Case as outlined by the Petitioners. *See*, Grasso, et.al. v. City of New Bedford et.al., No. 92-01987 (Mass.Super., Nov.2, 1998) (1998 WL 795052) included as APPENDIX E to Petition for Writ of Certiorari, at 51a – 70a. *See also*, Grasso, et.al. v. City of New Bedford et.al., 55 Mass. App. Ct. 1116 (2002), included as APPENDIX D to Petition for Writ of Certiorari, at 22a – 33a.

ARGUMENT

The Petitioners assert that the City of New Bedford and the Commonwealth of Massachusetts acted jointly to prevent and/or delay the Petitioners from obtaining permits or making improvements which prevented them from increasing the value and developing their property. *See* Pet. for Writ of Cert., at 30. For

this "loss," the Petitioners seek compensation. Petitioners' groundless argument contends that the State Court has not addressed the question of whether a City or State is liable for compensation for a regulatory taking when the governmental entities would not, by regulation, take action which may have increased the value of Petitioners' property. This issue clearly does not warrant review by the Court, as shown in the opinions from this Court and the State Courts below. The Respondents respectfully request that the Petition be denied.

A. THIS COURT HAS PREVIOUSLY ADDRESSED THE QUESTION OF COMPENSATION FOR BOTH PHYSICAL AND REGULATORY TAKINGS IN PRIOR DECISIONS AND THERE IS NO BASIS TO SEEK A WRIT ON THE GROUNDS ASSERTED BY THE PETITIONER.

Most recently in Palazzolo v. Rhode Island, 533 U.S. 606 (2001) and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, No. 00-1167, slip op. (U.S. April 23, 2002), this Court has reviewed the jurisprudence of both physical and regulatory takings. The Court has made it clear that cases involving regulatory takings require a case by case analysis. The categorical rule announced in Lucas v. South Carolina Coastal

Council, 505 U.S. 1003 (1992) states that compensation is required when the regulations or the actions of the public entity deprives an owner of "all economically beneficial uses" of his land. *Id.*, at 1019. If a regulation does not deprive an owner of all economic benefit, then the analysis shifts to that as set out in Penn Central Transportation Co., v. New York City, 438 U.S. 104 (1978). When a taking involves neither a physical invasion, nor a complete deprivation of use, Federal law has established several interrelated factors which are to be considered in determining whether a compensable taking has occurred: "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986), quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). In the case at bar, the trial judge found there was no physical taking and neither the City nor the Commonwealth caused any physical injury to the property. *See* Grasso, No. 92-01987 (Mass.Super., Nov.2, 1998) (1998 WL 795052) included as APPENDIX E to Petition for Writ of Certiorari, at 70a.

The Petitioners base their claim for compensation on, "a continuing barrage of decisions and actions by diverse local and state actors, all intended to delay his development of his property." Pet. for Writ of Cert., at 21. The Petitioners allege that these acts frustrated and hindered the private development of the property and prevented it from increasing in market value. Petitioners' claim for compensation in these circumstances is contrary to existing law as expressed by this Court in Palazzolo and Tahoe-Sierra, whose plaintiffs experienced economic loss or loss to the beneficial use of their property. In the instant case, the Petitioners sustained no such losses. The State Court found:

> ... it is apparent that the parcel maintained substantial value for alternative economically viable uses." Grasso, 55 Mass. App. Ct. 1116 (2002), included as APPENDIX D to Petition for Writ of Certiorari, at 42a.

This is not a case in which the actions of the government changed the status of the land. Instead, the government simply maintained the status quo. Petitioners' claim that the government's inaction failed to enhance the value of their property. Petitioners

then attempt to convert this so-called "loss" into compensation under the Constitution. As the Court stated in Tahoe-Sierra:

> A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisions. Such an important change in the law should be the product of legislative rulemaking rather than adjudication." Tahoe-Sierra No. 00-1167, slip op. (U.S. April 23, 2002) at 31.

B. PETITIONERS' RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENT WERE NOT VIOLATED BY THE ACTIONS OF STATE OR LOCAL OFFICIALS IN MASSACHUSETTS

Petitioners allege that the City of New Bedford violated the Fifth and Fourteenth Amendments by failing to re-zone Petitioner's property and by the actions of certain City Councilors who publicly opposed state legislation to change the harbor line. *See* Pet. for Writ of Cert., at 13 – 15. Petitioners' position is inconsistent with this Court's holding in Penn Central.

> .... in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized

> real property interests. See Necktow v. Cambridge, 277 U.S. 183, 188 (1928). Zoning laws are, of course, the classic example, see Euclid v. Ambler Realty Co., 272 U.S. 265 (1926) (prohibition of industrial use); Gorieb v. Fox, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt); Welsh v. Swasey, 214 U.S. 91 (1909) (height restriction), which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. See Goldblatt v. Hempstead, 369 U.S. 590 at 592-593 (1962) and cases cited; see also Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674, n. 8 (1976). Penn Cent., 438 U.S. 104, 124 (1978)

The Petitioners' requested zoning amendment, as well as their petitions to the state, were based solely upon Petitioners' desire to utilize the subject property in a manner which Petitioners believed to be more financially lucrative than those uses allowed by legitimate zoning and other regulatory limitations.

When the Petitioners took title to the subject property in 1986, it was zoned "Industrial "B". Since Industrial "B" zoning, which prohibited residential use, had been in place since 1926, Petitioners had no reasonable investment-backed expectation to believe they could obtain permitting for their project without a zoning change. *See* Penn Cent., 438 U.S. 104, 124 (1978). *See also* Palazzolo, 533 U.S. 606, 617-618 (2001).

"A property owner's investment-backed expectations must be reasonable and predicated on existing conditions." Leonard v. Brimfield, 423 Mass. 152, 155 (1996) [The plaintiff did not demonstrate that she had a reasonable investment-backed expectation that she would have been able to subdivide her property where she purchased the property subject to the restrictions on building on a flood plain]. It must be more than a "unilateral expectation or an abstract need." Ruckelshaus v. Monsanto Co., 476 U.S. 986, 1005 (1984), quoting Webbs Fabulous Pharmacies, Inc. v. Beckwith, 499 U.S. 155, 161 (1980). Since the Petitioners purchased the property subject to the restrictions on use in an "Industrial 'B'" zone they may not complain about the loss of a right they never acquired. *See* Lucas, 505 U.S. 1003, 1027 (1992). "[T]he government is not required to compensate an individual for denying him the right to use that which he has never owned." Fragopoulos v. Rent Control Board of Cambridge, 408 Mass. 302, 309 (1990) (No taking where plaintiff purchased his property subject to rent stock preservation ordinance which forbade him from converting four-unit building to owner-occupied three-unit building); Flynn v. Cambridge, 383 Mass. 152, 160 (1981) (No

taking where owners purchased condominium apartments after effective date of ordinance forbidding owner occupation of such apartments).

Petitioners have offered no proof that the Respondent, as a matter of law, was required to grant its petition for a zoning change. "Land use planning is not an all- or- nothing proposition. A government entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property." MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 347 (1986).

In the present case, Petitioners never challenged the zoning classification and never attempted to demonstrate that a City land use regulation failed to advance a legitimate state interest. Petitioners rezoning petition was based not on an allegation that the property had been spot zoned or had no reasonable use as Industrial B. Petitioners sole basis for their petition for a zoning change was that Petitioner desired to utilize the subject property for a use that was not allowed, but which Petitioner believed to be more financially lucrative than those uses allowed in an Industrial B zone. Petitioners base their claim on the fact that they were denied a

zoning change for which they had no reasonable investment backed expectation.

CONCLUSION

For the reasons set forth above, Respondent requests that this petition for writ of certiorari be denied.

Respectfully submitted,

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